Ref. No. 317

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding Case No. 91100047
FLAT KNITTING MILLS, CO., INC., Respondent.	)	

ORDER TO SHOW CAUSE
(April 18, 1991)

The Immigration and Naturalization Service (INS) filed its Complaint in this case on April 1, 1991 alleging violations by Respondent corporation of 8 U.S.C. §1324a(a)(1)(B), failure to verify paperwork requirements. The Complaint demanded a total of $8,500 in civil money penalties.

The Office of the Chief Administrative Hearing Officer (OCAHO) as in the usual course issued a Notice of Hearing on April 2, 1991, with the Complaint enclosed. By that Notice, Respondent was cautioned that failure to answer the Complaint within 30 days of receipt of the Complaint might result in a default judgment entered by the administrative law judge.

On April 2, 1991 the OCAHO docket section mailed the Hearing and Complaint by certified mail, return receipt to Steven Althaus, President, Flat Knitting Mill address provided by INS in its underlying (NIF) (Exhibit A to the Complaint), i.e., 590 Oak Street, Copiague, New York, 11726. A second copy of the Notice with the Complaint enclosed was mailed, certified mail, return receipt requested, on the same date to Arlene L. Boas, Esquire, 330 Eagle Avenue, West Hempstead, New York 11552.

Exhibit B to the Complaint is the request for hearing before an administrative law judge, dated February 11, 1991 on the letterhead of Ms. Boas, "Counsellor at Law." Exhibit B contains also an INS entry of appearance form dated September 18, 1989 by which Althaus authorized Boas to appear before INS on behalf of Flat Knitting Mills Co., Inc.

On April 10, 1991 the Postal Service returned to OCAHO the mailing addressed to Respondent, endorsing the wrapper, "MOVED LEFT NO ADDRESS COPIAGUE NY 11726-9998." On that same date, OCAHO also received the return receipt for the mailing to Ms. Boas.

Because that receipt failed to identify the date of delivery, my staff telephoned her on April 10 to ask when she had received the Notice and Complaint (in order to determine when to start counting the 30 day period for filing an answer to the Complaint).

Ms. Boas advised instead that she had previously withdrawn from representing Flat Knitting Mills Co., Inc. and had so informed INS in writing. At my direction, she was asked to provide a copy of that communication. By letter to me dated April 10, 1991, Arlene L. Boas wrote as follows:

> Enclosed for your information is a copy of the letter I sent on March 19, 1991, to Walter P. Connery and the Executive Office for Immigration Review in New York withdrawing my appearance in this matter.

The enclosure, a letter dated March 19, 1991, referring to Flat Knitting Mills, Co., Inc., was addressed to Mr. Connery and to the Executive Office for Immigration Review (EOIR), Office of the Immigration Judge, New York:

> This is to inform you that the referenced company has closed their doors to business and does not intend to reopen.
>
> Accordingly, they have advised me I am to take no further action on their behalf and I hereby withdraw my appearances in the referenced matter.

Ms. Boas addressed her withdrawal letter to EOIR in New York, not to OCAHO. It is understood among those familiar with NIF practices and statistics that many, if not most, requests for hearing never result in complaints before administrative law judges. It is not unusual where INS does file a complaint that an extensive period of time may elapse between the request for hearing and the filing of a complaint. I hold that it is immaterial that she did not send her withdrawal letter to OCAHO since on March 19, 1991 no complaint was pending in this Office. Indeed, it would be almost two weeks, nine working days, before the Complaint was filed on April 1.

I also find in the official docket a letter addressed to the Chief Administrative Hearing Officer (CAHO) dated March 28, 1991 from INS, in the name of the Acting General Counsel and District Counsel, signed by a trial attorney. The letter recites that it encloses the Complaint for filing in this case, and that Respondent may be served with the Complaint and Notice of Hearing "by mailing a copy to each of the following," i.e., Arelene L. Boas and Steven Althaus. INS then states the following:

> The attorney has indicated that she is withdrawing from this matter. Having made her appearance at the outset of the proceeding, service upon her would still seem appropriate. However, service on both may be advisable.

It is for INS, not the administrative law judge, to gauge whether to commit its prosecutorial resources to a case for which it is on notice that the prospective respondent may no longer be a going business. INS, however, might have been more forthcoming as to the status of Respondent's representation at the time it filed the Complaint. Inexplicably, not having provided OCAHO a copy of the Boas letter which on March 19 unequivocally recites that she "hereby" withdraws her appearance, and explains the reason for that action, INS on March 28 characterizes her action to OCAHO as having "indicated that she is withdrawing from this matter." (Emphasis added).

This is not the same situation as that which confronted the administrative law judge in United States v. Koamerican Trading Corp., OCAHO Case No. 89100092 (May 19, 1989). There, the question on a motion for default judgment sought by INS was whether service by OCAHO of the complaint only on the attorney who requested the hearing constituted effective service upon the respondent. The judge held that it did not and declined to default the respondent, finding upon response to an Order to Show Cause Why Judgment by Default Should Not Issue (April 27, 1989) that the respondent provided good cause to explain tardy filing.

The judge, upon issuing the Show Cause, had explained that he was uncertain whether the respondent had been properly put on notice of the complaint because the attorney who had appeared before INS for the purpose of requesting the hearing had not appeared before OCAHO, and the OCAHO had mailed the complaint solely to that attorney. Upon request by INS for review, the Acting CAHO vacated the judge's denial of the default, reasoning that service upon the attorney who had [illegible] satisfied the OCAHO regulatory requirement [illegible] "attorney of record of a party." K[illegible] Case No. 89100092 (CAHO Order, June [illegible] in Support, at 5). The CAHO Order [illegible]

> The attorney for respondent . . . in effect entered a notice of appearance . . . when he requested in writing a hearing on behalf of respondent. As such, respondent was properly served with the complaint and notice of hearing pursuant to 28 C.F.R. 68.3(b). Therefore, failure to effect service of the complaint and notice of hearing directly on respondent is not good cause why a timely answer was not filed, nor is it a defense as to why a default judgment should not issue.

Id. at 3.

In the instant case, service of the Complaint upon Respondent was attempted but was unsuccessful. Service was successful as a matter of mechanics upon the attorney who made the request to INS for hearing before the administrative law judge. It is hornbook law, reiterated only a few months ago by the Supreme Court, that service upon an attorney is "the common and established practice of providing notification. . . ." Irwin v. Veterans Administration, ___ U.S.___, 111 S.Ct. 453 (1990). In contrast to the Equal Employment Opportunity Commission in Irwin and to OCAHO in Koamerican, by the time OCAHO issued its Notice of Hearing in the present case it was on notice from INS that the attorney had already "indicated" she was withdrawing from the representation. While it was misadventure for OCAHO to address the Complaint to the lawyer, it was mischievous for INS to suggest on March 28 that Ms. Boas had merely "indicated that she is withdrawing" when it knew from her March 19 letter that she had already withdrawn her appearance.

Here, we have a case where the putative representative clearly withdrew before the Complaint was filed.[1] It is unclear what authority the administrative law judge may have over an attorney who has entered an appearance in fact or in legal effect. It is a certainty, however, that as to an attorney who has withdrawn before the action is filed in OCAHO the judge has no authority to invoke. Accordingly, I hold that Ms. Boas was not a proper representative to be served in this case. This Order nullifies that service, and holds it nought. Service directly upon Respondent having been frustrated, I find as a matter of law that Respondent is not yet before me. [2]

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1 To my mind, the result reached in this Order is exactly consistent with, not in derogation of, the result reached by the Acting CAHO in Koamerican. This is not to suggest, however, that I would not welcome a revisitation of the principles addressed by Koamerican in an appropriate case. For example, the result reached by the order on review in Koamerican leaves unanswered certain seminal questions. If, as characterized in the Memorandum in support of that Order
on at the trial level to deny a default is a
to interlocutory review is there any
ible? See Koamerican, OCAHO Case No.
cf. Koamerican, OCAHO Case No.
uiry to the Parties) (Aug. 14, 1989)
before INS by a representative who
an administrative law judge is an
what is the extent of control by
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See 8 U.S.C. §1324a(e)(3)(A). The
Koamerican, similar cases, and the
le an impetus to reconsider whether
response to NIFs ought to be made

Previously confronted with the inability of OCAHO to successfully serve a respondent by mail, no other representative being evident, I issued a Show Cause Order in United States v. Lee & Young Co., Inc., OCAHO Case No.90100348 (Jan. 16, 1991), which invited INS to take one of several actions:

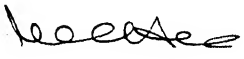
> (1) INS may move to dismiss the Complaint without prejudice.
>
> (2) INS may effect service, and file a certificate attesting to that fact, in accordance with the Rules of Practice and Procedure in cases before administrative law judges, 28 C.F.R. §68.3(a), including, for example, service on the "registered agent for service of process" of the Respondent corporation.
>
> (3) If INS is able to locate the principal office or place of business of Respondent it may be able to effect service and to so certify in accord with 28 C.F.R. §68.3(b).

Service in that case was subsequently perfected by INS, after which the respondent defaulted. Lee & Young Co., Inc., OCAHO Case No. 90100348 (April 17, 1991).

I adopt the same procedure for the present case. INS will be expected to advise me of its completed actions by an appropriate pleading to be filed not later than May 20, 1991. Failing effective service or an appropriate motion to dismiss, I will consider dismissing the Complaint, without prejudice, sua sponte.

SO ORDERED.

Dated this 18th day of April, 1991.



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